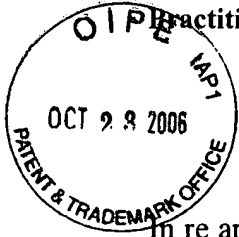


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Practitioner's Docket No. RAR333.04

PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of: Rael Sacks

Application No.: 10/615,967

Filed: 07/09/2003

Group No.: 3643

Examiner: Gellner, Jeffrey L.

For: Extruded Landscape Edging System and Method of Making Same

Mail Stop APPEAL BRIEF - PATENTS

Commissioner for Patents

P.O. BOX 1450

Alexandria, VA 22313-1450

TRANSMITTAL OF APPEAL BRIEF - AMENDED
(PATENT APPLICATION—37 C.F.R. 41.37)

1. Transmitted herewith, in triplicate, is the APPEAL BRIEF - AMENDED in this application, with respect to the Notice of Appeal filed on May 2, 2006. This amended appeal brief is being filed in response to the Notification of Non-Compliant Appeal Brief mailed on August 22, 2006.

2. STATUS OF APPLICANT

This application is on behalf of other than a small entity.

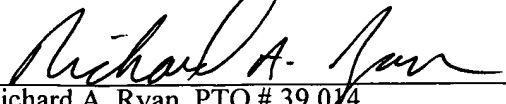
3. FEE FOR FILING APPEAL BRIEF

Fee previously paid.

Certificate of Express Mailing - 37 C.F.R. § 1.10

Express Mail Label No.: ED699976563US Date of Deposit: 10/23/2006

I hereby certify that the papers and/or fees identified in this letter are being deposited with the United States Postal Service "Express Mail Post Office to Addressee" service under 37 C.F.R. § 1.10 on the date indicated above and is addressed to Mail Stop Appeal Brief-Patent, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.


Richard A. Ryan, PTO # 39,074

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(Transmittal of Amended Appeal Brief—page 1 of 2)

4. EXTENSION OF TERM

The proceedings herein are for a patent application and the provisions of 37 C.F.R. 1.136 apply.

Applicant petitions for an extension of time under 37 C.F.R. 1.136 (fees: 37 C.F.R. 1.17(a)(1)-(4)) for one (1) month*:

Fee \$120.00

If an additional extension of time is required, please consider this a petition therefor.

* Note: The Notification of Non-Compliant Appeal Brief was Mailed August 22, 2006 and set forth a time for response of one month, which expired September 22, 2006. The amended appeal brief is being filed on October 23, 2006. Because a one month extension of time would expire on October 22, 2006, which is a Sunday, and the filing date of the amended brief is the first Monday thereafter, October 23, 2006, a one month extension of time is believed appropriate.

5. TOTAL FEE DUE

The total fee due is:

Appeal brief fee: \$ 0.00
Extension of term: \$ 120.00

TOTAL FEE DUE \$ 120.00

6. FEE PAYMENT

Attached is a check in the amount of \$ 120.00.
A duplicate of this transmittal is attached.

Date: 10/23/2006


SIGNATURE OF PRACTITIONER

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Practitioner's Docket No. RAR333.04

PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of: Rael Sacks

Application No.: 10/615,967

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Examiner: Gellner, Jeffrey L.

Mail Stop APPEAL BRIEF - PATENTS

Commissioner for Patents

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Alexandria, VA 22313-1450

ATTENTION: Board of Patent Appeals and Interferences

APPELLANT'S BRIEF (37 C.F.R. 41.37) - AMENDED

This brief is in furtherance of the Notice of Appeal, filed in this case on May 2, 2006.

The fees required under § 41.20(b)(2), and any required petition for extension of time for filing this brief and fees therefor, are dealt with in the accompanying TRANSMITTAL OF APPEAL BRIEF.

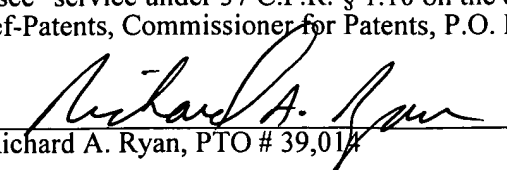
This brief is transmitted in triplicate.

This brief contains these items under the following headings, and in the order set forth below (37 C.F.R. 41.37(c)):

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Express Mail Label No.: ED689976563 US Date of Deposit: 10/23/2006

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Richard A. Ryan, PTO # 39,014

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I. REAL PARTY IN INTEREST (37 C.F.R. 41.37(c)(I))

The real party in interest in this appeal is National Diversified Sales, Inc., the assignee of the party named in the caption of this brief (assignment executed 07/10/03).

II. RELATED APPEALS AND INTERFERENCES (37 C.F.R. 41.37(c)(ii))

With respect to other appeals or interferences that will directly affect, or be directly affected by, or have a bearing on the Board's decision in the pending appeal there are no such appeals or interferences.

III. STATUS OF CLAIMS (37 C.F.R. 41.37(c)(iii))

A. TOTAL NUMBER OF CLAIMS IN APPLICATION

Claims in the application are: 1-22

B. STATUS OF ALL THE CLAIMS IN APPLICATION

1. Claims previously canceled: 19 and 20
2. Claims withdrawn from consideration but not canceled: None
3. Claims pending: 1-18, 21 and 22
4. Claims allowed: None
5. Claims rejected: 1-18, 21 and 22

C. CLAIMS ON APPEAL

The claims on appeal are: 1-18, 21 and 22.

IV. STATUS OF AMENDMENTS (37 C.F.R. 41.37(c)(iv))

An Amendment/Response was filed on December 30, 2004 in response to the initial Office Action by the Examiner. In that Amendment/Response, the Appellant cancelled claims

19 and 20 as being directed to a non-elected invention (method of manufacture), amended claims 1, 2, 7, 8, 12, 16 and 17, and added claims 21 and 22. The claims pending after the filing of the above-identified Amendment/Response were 1-18, 21 and 22, the claims currently pending in the application and the subject of this appeal. An Amendment/Response filed August 17, 2005 resulted in no further amendments, cancellations or additions to the claims.

V. SUMMARY OF CLAIMED SUBJECT MATTER (37 C.F.R. 41.37(c)(v))

A. INDEPENDENT CLAIM 1

Claim 1 is directed to a landscape edging system comprising an edging strip 12 and a connector 14 that is configured to connect, in an end-to-end manner two adjacent edging strips 12a & 12b, shown in FIGS. 3 & 4, to establish a border or divider around a landscape feature, such as a garden, lawn, flower bed, trees and the like, shown as 16, 18 and 20 in FIG. 1. (p.12:11-18.) The edging strip 12 has a top surface 30, a bottom surface 32, a first end 26 and an opposing second end 28. (p.13, 8-13.) The edging strip 12 has a relatively thin shell layer 24 disposed around a core layer 22 having one or more longitudinal channels 36, shown as 36a, 36b and 36c in FIG. 2, disposed therein. (p.13:8-12; p.14:3-10; p.15:4-14.) Each of the channels 36 in the core layer 22 has a channel wall 38. (p.14:3-10.) The connector 14 has a channel shaped sleeve portion 42 having an open first end 44 and an open second end 46 that are configured to receive either the first end 26 or the second end 28 of the edging strip 12. (p.19:14 - p.20:3.) The connector 14 has an internal body member 48 disposed in the sleeve portion 42. (p.19:14-17.) The internal body member 14 has one or more extending portions 50 that are each configured to be received in one of the channels 36 of the edging strip. (p.19:14-17; p.20:9-12.) As shown in FIG. 3, in one example the second end 28 of one edging strip 12a is received in the first end 44 of the sleeve portion 42 of connector 14 and the first end 26 of adjoining edging strip 12b is received in the second end 46 of the sleeve portion 42 of connector 14 so as to connect the two adjacent edging strips 12a and 12b and form a somewhat continuous strip of landscape edging. (p.22:7-23:1).

B. INDEPENDENT CLAIM 12

Claim 12 is directed to a landscape edging system comprising an edging strip 12 and a connector 14 that is configured to connect, in an end-to-end manner two adjacent edging strips 12a & 12b, shown in FIGS. 3 & 4, to establish a border or divider around a

landscape feature, such as a garden, lawn, flower bed, trees and the like, shown as 16, 18 and 20 in FIG. 1. (p.12:11-18.) The edging strip 12 has a top surface 30, a bottom surface 32, a first end 26 and an opposing second end 28. (p.13, 8-13.) The edging strip 12 has a relatively thin shell layer 24 disposed around a core layer 22, with the core layer 22 and shell layer 24 being co-extruded such that the shell layer 24 substantially encapsulates the core layer 22. (p.13:8-12) The core layer 22 has two or more longitudinal channels 36, shown as 36a, 36b and 36c in FIG. 2, disposed therein. (p.14:3-10; p.15:4-14.) Each of the channels 36 in the core layer 22 has a channel wall 38. (p.14:3-10.) The connector 14 has a channel shaped sleeve portion 42 having an open first end 44 and an open second end 46 that are configured to receive either the first end 26 or the second end 28 of the edging strip 12. (p.19:14 - p.20:3.) The connector 14 has an internal body member 48 disposed in the sleeve portion 42. (p.19:14-17.) The internal body member 14 has one or more extending portions 50 that are each configured to be received in one of the channels 36 of the edging strip. (p.19:14-17; p.20:9-12.) As shown in FIG. 3, in one example the second end 28 of one edging strip 12a is received in the first end 44 of the sleeve portion 42 of connector 14 and the first end 26 of adjoining edging strip 12b is received in the second end 46 of the sleeve portion 42 of connector 14 so as to connect the two adjacent edging strips 12a and 12b and form a somewhat continuous strip of landscape edging. (p.22:7-23:1).

C. INDEPENDENT CLAIM 21

Claim 21 is directed to a landscape edging system comprising an edging strip 12 and a connector 14 that is configured to connect, in an end-to-end manner two adjacent edging strips 12a & 12b, shown in FIGS. 3 & 4, to establish a border or divider around a landscape feature, such as a garden, lawn, flower bed, trees and the like, shown as 16, 18 and 20 in FIG. 1. (p.12:11-18.) The edging strip 12 has a top surface 30, a bottom surface 32, a first end 26 and an opposing second end 28. (p.13, 8-13.) The edging strip 12 has a relatively thin shell layer 24 disposed around a core layer 22, with the core layer 22 and shell layer 24 being co-extruded such that the shell layer 24 substantially encapsulates the core layer 22. (p.13:8-12) The core layer 22 has two or more longitudinal channels 36, shown as 36a, 36b and 36c in FIG. 2, disposed therein. (p.14:3-10; p.15:4-14.) Each of the channels 36 in the core layer 22 has a channel wall 38. (p.14:3-10.) The connector 14 has a channel shaped sleeve portion 42 having an open first end 44 and an open second end 46 that are configured to receive either the first end 26 or the second end 28 of the edging

strip 12. (p.19:14 - p.20:3.) The connector 14 has an internal body member 48 disposed in the sleeve portion 42. (p.19:14-17.) The internal body member 14 has one or more extending portions 50 that are each configured to be received in one of the channels 36 of the edging strip. (p.19:14-17; p.20:9-18.) As shown in FIG. 3, in one example the second end 28 of one edging strip 12a is received in the first end 44 of the sleeve portion 42 of connector 14 and the first end 26 of adjoining edging strip 12b is received in the second end 46 of the sleeve portion 42 of connector 14 so as to connect the two adjacent edging strips 12a and 12b and form a somewhat continuous strip of landscape edging. (p.22:7-23:1).

D. GENERAL SUMMARY OF INVENTION

In general, claims 1-18, 21 and 22 (the pending claims) are directed to a landscape edging system comprising an edging strip and a connector that is configured to connect, in an end-to-end manner two adjacent edging strips to establish a border or divider around a landscape feature, such as a garden, lawn, flower bed, trees and the like. The edging strip has a top surface, a bottom surface, a first end and an opposing second end. The outer portion of the edging strip comprises a thin shell layer that generally encapsulates an inner core layer having one or more longitudinal channels disposed therein. Each of the channels in the core layer has a channel wall that cooperates with the connector, which is configured to be at least partially received in a channel. The connector has a channel shaped sleeve portion having an open first end, an open second end and an internal body member disposed in the sleeve that connects the two adjacent edging strips to form a somewhat continuous strip of landscape edging. The internal body member has one or more extending portions that are configured to be received in the channels at the ends of two adjoining edging strips, which are received in the sleeve portion of the connector.

In the preferred embodiment, the outer shell layer and inner core layer are co-extruded, the core layer is substantially made up of re-grind or recycled plastic material and the thin shell layer is a high quality plastic material. To substantially prevent undesired twisting between and misalignment of adjacent edging strips, the preferred core layer has two or more channels and the connector has two or more extending portions, each of which is configured to be received in one of the channels. To better secure the connector in the channel, the extending portion can have a tapered edge that is configured to be engagingly received by the channel wall or one or more protruding barbs configured to engage the channel wall. A stake member can be used to clamp over or penetrate the edging strip to secure the edging strip to the ground. Unlike

prior art devices, the landscape edging strips of the present invention reduces the manufacturing cost by allowing the utilization of lower quality interior or core materials and better quality outer or shell material that provides a strong, attractive outer finish without compromising on the qualities desired for the edging strip. The use of continuous channels through the edging strip makes it easier to manufacture, easier for the user to install by allowing the user to cut the edging strip at any point to place a connector and reduces the overall weight (i.e., for handling) of the edging strips.

VI. GROUNDS OF REJECTION TO BE REVIEWED (37 C.F.R. 41.37(c)(vi))

Issue 1: Whether claims 1, 6, 8, 9, 12 and 17 are patentable under 35 U.S.C. § 103(a) over Lemelson (U.S. Patent No. 3,933,311) in view of Beladakis (U.S. Patent No. 5,715,628).

Issue 2: Whether claims 2 and 21 are patentable under 35 U.S.C. § 103(a) over Lemelson (U.S. Patent No. 3,933,311) in view of Beladakis (U.S. Patent No. 5,715,628) in view of Gruber (DE 3039971 A1).

Issue 3: Whether claims 3-5 and 13-15 are patentable under 35 U.S.C. § 103(a) over Lemelson (U.S. Patent No. 3,933,311) in view of Beladakis (U.S. Patent No. 5,715,628) in further view of Walsh, et al. (U.S. Patent No. 4,820,469).

Issue 4: Whether claims 7 and 16 are patentable under 35 U.S.C. § 103(a) over Lemelson (U.S. Patent No. 3,933,311) in view of Beladakis (U.S. Patent No. 5,715,628) in further view of Wuster (U.S. Patent No. 6,389,742).

Issue 5: Whether claims 10, 11 and 18 are patentable under 35 U.S.C. § 103(a) over Lemelson (U.S. Patent No. 3,933,311) in view of Beladakis (U.S. Patent No. 5,715,628) in further view of Danna, et al. (U.S. Patent No. 6,108,969).

Issue 6: Whether claim 22 is patentable under 35 U.S.C. § 103(a) over Lemelson (U.S. Patent No. 3,933,311) in view of Beladakis (U.S. Patent No. 5,715,628) in further view of Gruber (DE 3039971 A1) and Walsh, et al. (U.S. 4,820,469).

VII. ARGUMENTS (37 C.F.R. 41.37(c)(vii))

Prior to discussing the arguments pertaining to the specific issues raised by the Examiner in the rejection of the subject claims, Appellant would like to set forth the obviousness principles relevant to the subject claims and rejections thereof. With regard to the obviousness rejections for Appellant's patent application, Section 103(a) only denies patentability to those inventions whose "subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains." (35 U.S.C. § 103.) The teachings from the prior art utilized to determine obviousness must be reasonably pertinent to the problems solved by Appellant's invention. (See In re Clay, 23 USPQ2d 1058, 1060 (CAFC 1992).) If the subject matter and purpose of Appellant's invention are different from the subject and purpose of the invention described in a prior art reference, it would be improper to utilize that reference in the obviousness analysis as a person skilled in the art would not have been motivated to look to or consider such a reference in attempting to solve the problems solved by Appellant's invention. (See In re Clay, 23 USPQ2d at 1061.) Under such circumstances, a person having ordinary skill in the art would not apply the teachings of the prior art to arrive at Appellant's invention. (Id.)

Even if certain prior art references are considered analogous art, there must be something in these references that suggests combining their teachings in order to reject claims under the obviousness standard. As stated by the court in In re Geiger, 2 USPQ2d 1276 (CAFC 1987), "[o]bviousness cannot be established by combining the teachings of the prior art to produce the claimed invention, absent some teaching, suggestion or incentive supporting the combination." (In re Geiger, 2 USPQ2d at 1278.) The motivation or suggestion to combine references must exist, otherwise the determination of obviousness involves nothing more "than indiscriminately combining prior art." (Micro Chemical Inc. v. Great Plains Chemical Co., 41 USPQ2d 1238, 1244 (CAFC 1997).) In In re Fritch, 23 USPQ2d 1780 (CAFC 1992), the Federal Circuit stated the following:

In proceedings before the Patent and Trademark Office, the Examiner bears the burden of establishing a prima facie case of obviousness based upon the prior art. The Examiner can satisfy this burden only by showing some objective teaching in the prior art or that knowledge generally available to one of ordinary skill in the art would lead that individual to combine the relevant teachings of the references.

Obviousness cannot be established by combining the teachings of the prior art to produce the claimed invention, absent some teaching or suggestion supporting the combination.

Under section 103, teachings of references can be combined *only* if there is some suggestion or incentive to do so. Although couched in terms of combining teachings found in the prior art, the same inquiry must be carried out in the context of a purported obvious "modification" of the prior art. The mere fact that the prior art may be modified in the manner suggested by the Examiner does not make the modification obvious unless the prior art suggested the desirability of the modification.

Here, the Examiner relied upon hindsight to arrive at the determination of obviousness. It is impermissible to use the claimed invention as an instruction manual or "template" to piece together the teachings of the prior art so that the claimed invention is rendered obvious. This court has previously stated that one cannot use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention. (In re Fritch, 23 USPQ2d at 1783-84 (internal quotes and citations removed).)

The above principles are applied to the Examiner's rejections of the various claims set forth in the Office Action. As set forth in more detail below, it is Appellant's position that the currently pending claims are not obvious in light of the prior art.

Issue 1: Whether claims 1, 6, 8, 9, 12 and 17 are patentable under 35 U.S.C. § 103(a) over Lemelson (U.S. Patent No. 3,933,311) in view of Beladakis (U.S. Patent No. 5,715,628).

As to the rejection of Appellant's claims under 35 U.S.C. § 103(a) as being unpatentable over Lemelson in view of Beladakis, Appellant respectfully disagrees with the Examiner. As set forth in the Office Action dated March 17, 2005, the Examiner is of the opinion that Lemelson discloses a landscape edging system having a core with two longitudinal channels disposed therein and a connector having a channel shaped sleeve portion with an internal body member having several extending portions thereon that are each configured to be received in one of the core's longitudinal channels and that Beladakis discloses a landscape edging with a core having a relatively thin shell layer. Based on the above, the Examiner takes the position that it would have been obvious to modify the edging system of Lemelson by adding a plastic coating as disclosed by Beladakis so as to provide UV protection so as to have the edging last longer. Respectfully, Appellant disagrees with the Examiner's analysis with regard to the obviousness of combining Lemelson with Beladakis.

With regard to the modification of the Lemelson edging system by adding the plastic coating of Beladakis, Appellant respectfully believes the Examiner is mistaken and that it would not have been obvious at the time of Appellant's invention to add the protective or ornamental covering for landscaping dividers of Beladakis to the edging system of Lemelson to obtain Appellant's invention. The covering of Beladakis is configured to be placed over the exposed exterior of the upper section of a landscape divider. The interior of the cap is

configured to conform to the exterior shape of the landscape divider over which it will be placed. The cap is made of flexible plastic that effectively “snaps” over the divider to change the appearance of the landscape divider or repair a damaged section of the landscaped divider. The landscape “fence structure” of Lemelson is not adaptable for coating with another material and no mention or suggestion is present in Lemelson to coat the fence structure with another material. Lemelson is directed to an assembly of a plurality of lattice-like units 11 having a central portion 12 with a sheet-like wall 13 having openings 14 therein. To coat the fence structure, with the shell disposed around the core in the manner suggested by Appellant, would be to lose the lattice-like effect of the Lemelson invention. No reference, discussion or even suggestion is made to place a relatively thin shell layer around the lattice-like units and it could not be done without substantial difficulty in maintaining the openings 14 in wall 13. The brief mention of making the central portion out of metal is made without any reference to needing to coat the metal to prevent corrosion, leading to the conclusion that only a corrosion resistant metal would be suitable for the fence structure of Lemelson. To suggest otherwise appears to require an application of hindsight to obtain a coated, lattice-like structure that provides the benefits set forth in Lemelson with the cap of Beladakis, which is improper for the obviousness analysis. (See In re Fritch, 23 USPQ2d at 1783-84.)

With regard to the edging strip of the present patent application, the teachings of Beladakis are not reasonably pertinent to the problems solved by Appellant’s invention. (See In re Clay, 23 USPQ2d at 1060.) Because the subject matter and purpose of Appellant’s invention are substantially different from the subject and purpose of the invention described in Beladakis, Appellant believes it is improper to utilize this patent in the obviousness analysis. A person skilled in the art would not have been motivated to look to or consider Beladakis in attempting to solve the problems solved by Appellant’s invention. (See Id. at 1061.)

Even if Beladakis is considered pertinent to Appellant’s invention, neither Lemelson nor Beladakis are concerned with, discuss or are in any way related to providing an edging strip having an inner core layer substantially encapsulated by a thin shell layer. As such, nothing suggests or compels combining the teachings of Lemelson or Beladakis, in any combination suggested by the Examiner, to arrive at Appellants’ invention. As stated by the court in In re Geiger, “[o]bviousness cannot be established by combining the teachings of the prior art to produce the claimed invention, absent some teaching, suggestion or incentive supporting the combination.” (In re Geiger, 2 USPQ2d at 1278.) The motivation or suggestion to combine the references must exist, otherwise the determination of obviousness involves nothing more “than indiscriminately combining prior art.” (Micro Chemical, 41 USPQ2d at

1244; In re Fritch, 23 USPQ2d at 1783-84.) Respectfully, nothing in the Lemelson or Beladakis references or any knowledge generally available to one of ordinary skill in the art compels, teaches, suggests or even offers any incentive such that an individual wanting to invent a dual layer edging strip with internal channels disposed in the inner layer such as Appellant's would utilize the references as suggested by the Examiner. (See In re Fritch, 23 USPQ2d at 1783; In re Geiger, 2 USPQ2d at 1278.

With regard to the connector portion of Appellant's landscape edging system, Appellant disagrees with the Examiner that Lemelson discloses a connector having a sleeve portion with an internal body member having several extending portions thereon that are configured to be received in the channels of the edging strip. Specifically, the sleeve portion, allegedly shown as 25, 26, 22, 27 and 28 of Fig. 1, is not a sleeve as that term is used in Appellant's invention and neither the internal body member (22) nor the extending portions (26A, 26B, 28A and 28B of Figs 1 and 2) are internal to the sleeve portion. Instead, as clearly shown in the figures, item 22 is a central shank or tubular formation that is not internal to the "sleeve" and the extending portions are also not internal to the identified "sleeve" portion. In fact, neither the central shank nor the extending portions are internal to any part of the connector or coupling member in Lemelson. Figure 2 in the Lemelson patent is an end view of the lattice-like units or, in Appellant's terms, the edging strip portion of the system. With regard to Appellant's invention, the sleeve portion, which is described beginning at page 19, line 14 and best shown in Figure 3 of the present patent application, is a generally channel-shaped member having open ends 44 and 46 configured to receive an end of the edging strip therein such that the sleeve portion covers the ends of two adjoining edging strips. Appellant previously amended claim 1 to specifically identify the sleeve portion as being channel-shaped and having open first and second ends that are configured to receive an end of the edging strip therein and to specifically identify the internal body member as being disposed in the sleeve portion. Appellant believes the amended language sufficiently clarifies his invention, as set forth in claim 1, and distinguishes from the prior art referenced by the Examiner.

With regard to the dependent claims which depend from claim 1, including claims 6, 8 and 9, these claims are believed to be allowable based on the believed allowability of claim 1.

With regard to independent claim 12, Appellant previously amended claim 12 to include the amendment with regard to claim 1 and to specifically identify the core layer as being substantially encapsulated by the thin shell layer. Appellant's arguments with regard to the obviousness of claims 1 and 2 in light of Lemelson and Beladakis, as well as with regard to Gruber below, are also applicable to claim 12 and, therefore, are incorporated herein with

respect to claim 12. With regard to the dependent claims which depend from claim 12, including claim 17, these claims are believed to be allowable based on the believed allowability of claim 12 in light of the arguments and amendments set forth herein.

Issue 2: Whether claims 2 and 21 are patentable under 35 U.S.C. § 103(a) over Lemelson (U.S. Patent No. 3,933,311) in view of Beladakis (U.S. Patent No. 5,715,628) in view of Gruber (DE 3039971 A1).

Claim 2 of the subject application adds the limitation that the core layer and the shell layer are co-extruded such that the shell layer substantially encapsulates the core layer. Claim 21 includes this same limitation in an independent claim. The Examiner rejected claims 2 and 21 under 35 U.S.C. § 103(a) as being unpatentable over Lemelson in view of Beladakis in view of Gruber. Appellant respectfully disagrees with the Examiner's analysis with regard to claims 2 and 21. Specifically, Appellant disagrees that it would have been obvious to further modify the invention of Lemelson, as modified by Beladakis, by utilizing co-extrusion to substantially encapsulate the core layer as allegedly suggested by Gruber. Gruber discloses a panel used for forming a landscape boundary that can be made of "rigid or elastic plastics, or metal, which may have a plastic coating." Appellant believes that the proper interpretation of the Gruber patent is that because the panel is configured to be placed in the ground where corrosion of metals is a known problem, the panel can be made of plastic, which is substantially corrosion resistant, or made out of metal with the metal having a plastic coating to prevent corrosion of the metal. For this purpose, there would be no need to coat the plastic with another plastic and coating the metal with plastic is not the same as co-extruding an encapsulated core material. As clearly set forth in Appellant's disclosure, the preferred method of making Appellant's edging strip having a shell layer encapsulating the core layer is to co-extrude the core layer and the shell layer such that they form a substantially unitary component. As discussed above, there is no reason or reasonable ability to co-extrude Lemelson with the "covering" referenced in Beladakis. With regard to the plastic coating mentioned at page 3, line 16 of the translation of Gruber, there is no suggestion of co-extruding the metal with the plastic coating (plastic coated metals being well known in various arts). Appellant previously amended claim 2 to clarify that the core layer and shell layer are co-extruded in a manner such that the shell layer substantially encapsulates the core layer. As stated above, claim 21 is an independent claim that includes this limitation.

Issue 3: Whether claims 3-5 and 13-15 are patentable under 35 U.S.C. § 103(a) over Lemelson (U.S. Patent No. 3,933,311) in view of Beladakis (U.S. Patent No. 5,715,628) in further view of Walsh, et al. (U.S. Patent No. 4,820,469).

Claim 3 of the subject patent application adds the limitation to claim 1 that the core layer is substantially made up of re-grind or recycled material. Claim 4 adds the limitation to claim 1 that the shell layer is a high quality plastic. Claim 5 adds the limitations to claim 1 that the core is made up of re-grind or recycled material, that the shell layer is a high quality plastic and that the core and shell layers are co-extruded. Claims 13-15 basically add the same limitations to independent claim 12, except that the co-extruding limitation is included in the limitations of claim 12.

The Examiner rejected claims 3-5 and 13-15 as being unpatentable over Lemelson in view of Beladakis in further view of Walsh et al., in that Walsh describes the use of re-grind plastic as a core material, the use of high quality plastic as a shell and the combination of the two for a plastic component such as Applicant's edging strip. Initially, Applicant's arguments with regard to the obviousness of claims 1 and 12 in light of Lemelson and Beladakis are also applicable to claims 3-5 and 13-15 and, therefore, are incorporated herein with respect to claims 3-5 and 13-15. In addition, because claims 3-5 depend from amended claim 1 and claims 13-15 depend from amended claim 12, these claims are believed to be allowable based on the believed allowability of claims 1 and 12, respectively, in light of the arguments and amendments set forth above.

With regard to the use of re-grind or recycled materials for the core layer, high quality plastic for an thin shell layer and the combination of the two for an edging strip, such use is not referenced, discussed or suggested by anything in either Lemelson or Beladakis and, as such, it would not be obvious to one skilled in the art to apply the teachings of Walsh to Lemelson and Beladakis to obtain Applicant's invention. (See In re Geiger, 2 USPQ2d at 1278.) To suggest otherwise appears to require an application of hindsight to obtain a coated, lattice-like structure that provides the benefits set forth in Lemelson with the cap of Beladakis and a re-grind or recycled material core of Walsh, which is improper for the obviousness analysis. (See In re Fritch, 23 USPQ2d at 1783-84.) In addition, Walsh is not directly related to landscape edging systems and, to Applicant's knowledge, use of co-extrusion to substantially encapsulate a core layer made out of re-grind or recycled materials with a higher quality outer shell layer has never been utilized for a landscape edging strip or divider.

Issue 4: Whether claims 7 and 16 are patentable under 35 U.S.C. § 103(a) over Lemelson (U.S. Patent No. 3,933,311) in view of Beladakis (U.S. Patent No. 5,715,628) in further view of Wuster (U.S. Patent No. 6,389,742).

Claim 7 of the present application depends from independent claim 1 and adds the limitation that one or more of the extending portions of the connector's internal body member has a tapered edge that is configured to be engagingly received by the channel wall of the edging strip. Claim 16 depends from claim 12 and adds the same limitation. The Examiner rejected claims 7 and 16 as being unpatentable over Lemelson in view of Beladakis in further view of Wuster in that the limitations of claims 1 and 12, the base independent claims, are obvious as set forth above and that Wuster discloses a connector having extending portions that are tapered. Applicant's arguments with regard to the obviousness of claims 1 and 12 in light of Lemelson and Beladakis are also applicable to claims 7 and 16 and, therefore, are incorporated herein with respect to claims 7 and 16. In addition, because claim 7 depends from claim 1 and claim 16 depends from claim 12 (as claims 1 and 12 were previously amended), these claims are believed to be allowable based on the believed allowability of claims 1 and 12, respectively, in light of the arguments and amendments set forth above.

Issue 5: Whether claims 10, 11 and 18 are patentable under 35 U.S.C. § 103(a) over Lemelson (U.S. Patent No. 3,933,311) in view of Beladakis (U.S. Patent No. 5,715,628) in further view of Danna, et al. (U.S. Patent No. 6,108,969).

Claim 10 of the present patent application depends from claim 1 and adds the limitation that the landscape edging system further comprises a stake member configured to engagingly secure the edging strip to the ground. Claim 11 depends from claim 10 and adds the limitation that the stake is configured to penetrate a side of the edging strip. Claim 18, which depends from claim 12, adds the same limitation as claim 10. The Examiner rejected claims 10, 11 and 18 as being unpatentable over Lemelson in view of Beladakis in further view of Danna, et al. (U.S. Patent No. 6,108,969) in that the limitations of claims 1 and 12, the base independent claims, are obvious as set forth above and that Danna discloses a stake member configured to engage the edging strip to the ground. Applicant's arguments with regard to the obviousness of claims 1 and 12 in light of Lemelson and Beladakis are also applicable to claims 7 and 16 and, therefore, are incorporated herein with respect to claims 7 and 16. In addition, because claim 7 depends from claim 1 and claim 16 depends from claim 12, these claims are believed to be allowable based on the believed allowability of claims 1 and 12, respectively (as claims 1 and 12 were previously amended), in light of the arguments and amendments set forth above. With regard to claim 11, Applicant disagrees with the Examiner with regard to Figure 6 of

Danna showing a stake penetrating the side of an edging strip. Danna shows the stake through the top of the edging strip, not the side of the edging strip as shown in Figure 4 and discussed at page 23, lines 6-13 of Applicant's disclosure.

Issue 6: Whether claim 22 is patentable under 35 U.S.C. § 103(a) over Lemelson (U.S. Patent No. 3,933,311) in view of Beladakis (U.S. Patent No. 5,715,628) in further view of Gruber (DE 3039971 A1) and Walsh, et al. (U.S. 4,820,469).

Claim 22 depends from independent claim 21 and adds the limitations that the core layer is substantially made up of re-grind or recycled material and the shell layer is a high quality plastic. The Examiner rejected claim 22 under 35 U.S.C. § 103(a) as being unpatentable over Lemelson in view of Beladakis in view of Gruber, as to claim 21, and further in view of Walsh. Applicant respectfully disagrees with the Examiner's analysis with regard to claim 22, which depends from claim 21, and incorporates the arguments set forth above with regard to claims 1, 2, 12 and 21 (claim 21 being similar to claim 12 with the additional limitations of the shell layer being integrally formed around the core layer and the extending portions of the internal body member being configured to be securely received in the channels of the edging strip). In addition, with regard to the use of re-grind or recycled materials for the core layer, high quality plastic for an thin shell layer and the combination of the two for an edging strip, such use is not referenced, discussed or suggested by anything in either Lemelson, Beladakis or Gruber and, as such, it would not be obvious to one skilled in the art to apply the teachings of Walsh to Lemelson, Beladakis or Gruber to obtain Applicant's invention. (See In re Geiger, 2 USPQ2d at 1278.) Further, Walsh is not directly related to landscape edging systems and, to Applicant's knowledge, use of co-extrusion to substantially encapsulate a core layer made out of re-grind or recycled materials with a higher quality outer shell layer has never been utilized for a landscape edging strip or divider. In addition, claim 22 depends from claim 21 and, therefore, is believed to be allowable as being dependent from an allowable base claim.

Conclusion

For the reasons advanced above, Appellant respectfully contends that each claim appealed from is patentable. Therefore, reversal of the rejection based on 35 U.S.C. § 103(a) is courteously solicited.

10/23/2006
DATE

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VIII. CLAIMS APPENDIX (37 C.F.R. 41.37(c)(viii))

1. A landscape edging system, comprising:

an edging strip having a top surface, a bottom surface, a first end and a second end, said edging strip having a relatively thin shell layer disposed around a core layer, said core layer having one or more longitudinal channels disposed therein, each of said channels having a channel wall; and

a connector having a channel-shaped sleeve portion with an open first end and an open second end, said open first end and said open second end configured to receive said first end of said edging strip or said second end of said edging strip in said sleeve portion, said sleeve portion having an internal body member disposed therein, said internal body member having one or more extending portions thereon, each of said one or more extending portions configured to be received in one of said channels of said edging strip.

2. The landscape edging system according to claim 1, wherein said core layer and said shell layer are co-extruded such that said shell layer substantially encapsulates said core layer.

3. The landscape edging system according to claim 1, wherein said core layer is substantially made up of re-grind or recycled material.

4. The landscape edging system according to claim 1, wherein said shell layer is a high quality plastic.

5. The landscape edging system according to claim 1, wherein said core layer is substantially made up of re-grind or recycled material, said shell layer is a high quality plastic and said core layer and said shell layer are co-extruded.

6. The landscape edging system according to claim 1, wherein said core layer has two or more longitudinal channels and said connector has two or more extending portions, each of said extending portions configured to be received in one of said channels.

7. The landscape edging system according to claim 1, wherein said one or more extending portions has a tapered edge, said tapered edge configured to be engagingly received by said channel wall.

8. The landscape edging system according to claim 1, wherein said one or more extending portions has one or more protruding barbs configured to engage said channel wall.

9. The landscape edging system according to claim 1, wherein each of said channels in said core layer has an opening at said first end and said second end of said edging strip.

10. The landscape edging system according to claim 1 further comprising a stake member configured to engagingly secure said edging strip to the ground.

11. The landscape edging system according to claim 10, wherein said stake is configured to penetrate a side of said edging strip.

12. A landscape edging system, comprising:

an edging strip having a top surface, a bottom surface, a first end and a second end, said edging strip having a relatively thin shell layer disposed around a core layer, said core layer and said shell layer co-extruded such that said shell layer substantially encapsulates said core layer, said core layer having two or more longitudinal channels disposed therein, each of said channels having a channel wall; and

a connector having a channel-shaped sleeve portion with an open first end and an open second end, said open first end and said open second end configured to receive said first end of said edging strip or said second end of said edging strip in said sleeve portion, said sleeve portion having an internal body member disposed therein, said internal body member having one or more extending portions thereon, each of said one or more extending portions configured to be received in one of said channels of said edging strip.

13. The landscape edging system according to claim 12, wherein said core layer is substantially made up of re-grind or recycled material.

14. The landscape edging system according to claim 12, wherein said shell layer is a high quality plastic.

15. The landscape edging system according to claim 14, wherein said core layer is substantially made up of re-grind or recycled material.

16. The landscape edging system according to claim 12, wherein said one or more extending portions has a tapered edge, said tapered edge configured to be engagingly received by said channel wall.

17. The landscape edging system according to claim 12, wherein said one or more extending portions has one or more protruding barbs configured to engage said channel wall.

18. The landscape edging system according to claim 12 further comprising a stake member configured to engagingly secure said edging strip to the ground.

19. (Cancelled)

20. (Cancelled)

21. A landscape edging system, comprising:

an edging strip having a top surface, a bottom surface, a first end and a second end, said edging strip having a relatively thin and integrally formed shell layer disposed around a core layer, said core layer and said shell layer co-extruded such that said shell layer substantially encapsulates said core layer, said core layer having two or more longitudinal channels disposed therein, each of said channels having a channel wall; and

a connector having a channel-shaped sleeve portion with an open first end and an open second end, said open first end and said open second end configured to receive said first end or said second end of said edging strip in said sleeve portion, said sleeve portion having an internal body member disposed therein between said first end and said second end thereof, said internal body member having one or more extending portions thereon, each of said one or more extending portions configured to be securely received in one of said channels of said edging strip.

22. The landscape edging system according to claim 21, wherein said core layer is substantially made up of re-grind or recycled material and said shell layer is a high quality plastic.

IX. EVIDENCE APPENDIX (37 C.F.R. 41.37(c)(ix))

None.

X. RELATED PROCEEDINGS APPENDIX (37 C.F.R. 41.37(c)(x))

None.